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SECURITY OF EMPLOYMENT IN THE PUBLIC SERVICE IN BOTSWANA: A SYNOPSIS

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INTRODUCTION

The State has often been looked upon by individuals, private sector employers and employees alike as a model employer. The Employment Act governs employment relationships in Botswana yet the State is excluded from the purview of the Act. The State happens to be, and is likely to continue being the biggest single employer in the country. The problems that the Employment Act was geared to address were regarded as matters that could only arise between private sector employee and employer.

The trend in Africa at present is that the public service is being trimmed down especially in those countries where the International Monetary Fund and the World Bank are involved, through programmes of structural adjustment. Even though Botswana is not undergoing such a process of structural adjustment, it is slowly but carefully moving in that direction though not at the behest of the International Monetary Fund and World Bank. There is a need to cut down on spending. Consequently, it is quite important to critically consider the question of security of employment in the public service. Perhaps the whole idea of trimming down the public service is to promote productivity and efficiency in the workplace and in the process get rid of those public servants who are found wanting in this respect. This research seeks to consider the security offered by the State as the model employer in this country.

MEANING OF THE PUBLIC SERVICE

In the context of Botswana, the Interpretation Act¹ provides that "public officer" and "public service" have the same meanings as in the Constitution.² According to the Constitution, "public officer" means a person holding or acting in any public office.³ The "public service" means the civil service of the Government.⁴ The common distinction between the "public" and "civil" service does not come out clearly within the definition provided by the Constitution. Indeed the Constitution seems to suggest that the two terms mean the same thing within the context of Botswana.

"In its wide meaning the expression "public sector" includes the offices of a government department, municipal employees, publicly owned hospitals and schools, employees (not members) of a parliament, the courts, the police force, fire brigades, government-owned airlines and railways, postal services, garbage collectors . . ."⁵ For purposes of this paper we shall restrict ourselves to the restricted definition as found in the constitution of Botswana.

1 Interpretation Act, 1984.

2 Constitution of Botswana, Cap 01:01.

3 Section 127 (1) of Constitution.

4 See note 3 above.

5 J. Schregle, "Labour Relations in the Public Sector," *Comparative Labour Law and Industrial Relations* Chapter 23 pg 503 3rd edition.

MEANING OF SECURITY OF EMPLOYMENT AND ITS IMPORTANCE

The plain meaning of this phrase⁶ is job security. As conveniently put by an International Labour Organisation official:⁷

ways in which workers may be provided with some security in the employment that is the very basis on which their livelihood depends.

Better still, it has also been referred to as the control of termination of employment at the initiative of the employer.⁸

Unemployment, which may be the direct result of an employer's exercise of his rights, has untold social consequences; principal among these are, poverty, broken homes, and even in extreme cases, may result in drastic political upheavals which have been witnessed not only in Africa but also in many other parts of the world.⁹

... Equally, this situation calls for serious and urgent attention particularly for us in Africa; problems like unemployment and retrenchment can create conditions for instability.¹⁰

Unemployment is associated with a variety of undesirable social consequences such as poverty and deprivation, social disintegration and adverse psychological problems¹¹

EMPLOYER'S RIGHTS VERSUS EMPLOYEE'S RIGHTS

The traditional rules governing the contract of employment included a prohibition of engagement for life as a protection against a return to conditions of servitude.¹² They were characterised by a formal symmetry of rights of the parties.¹³ The employer could terminate the employment relationship by giving notice and the employee could do the same, exercising his fundamental right to protect his freedom of work. The consequences of this formal symmetry of rights differed widely for the parties. The consequences for the employer could range from mere inconvenience to loss of production and profits. The termination of the contract of employment by the employer could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment.¹⁴ The disparity of the consequences of each party exercising its discretionary power to terminate the employment relationship led in many countries to a movement towards workers' protection¹⁵ or security of employment for the employee.

6 "Security of Employment".

7 Address by Faizal Abdel-Rahman; Assistant Director-General for ILO Activities for Africa in *Collective Bargaining and Security of Employment in Africa: English-Speaking Countries*, 1987.

8 B. Heppel, "Security of Employment" *Comparative Labour law and Industrial Relations*, Chapter 22 pg 477. 3rd Edition.

9 Kwame Frimpong: *The Protection of Security of Employment in Botswana*. ILO/Norway Seminar on Protection of Employment and Promotion of Collective Bargaining held at Gaborone, Botswana — November 19–21, 1985 pg 1.

10 Opening address by Comrade F.M.M. Shava, Minister of Labour, Manpower Planning and Social Welfare, Zimbabwe at the *Symposium on Collective Bargaining and Security of Employment in Africa: English-Speaking Countries* 3–8 May, 1987 pg 5.

11 *Ibid.*, note 7 pg 3.

12 *Protection against Unjustified Dismissal* International Labour Conference 82nd session 1995.

13 *Ibid.* See further "The role of ILO in the protection of security of employment" in *Collective Bargaining and Security of Employment in Africa: English-Speaking Countries*, pg 31.

14 *Review of standards in the field of termination of employment*, Protection against Unjustified Dismissal pg 1. International Labour Conference 82nd session 1995.

15 *Ibid.*, note 12.

Initially, the movement towards the workers protection took the form of an extension of the notice period sometimes for both employer and employee but more frequently for the employer.¹⁶ Next, it was made obligatory for the employer to pay severance allowance on termination of employment, in recognition of past service.¹⁷ Eventually, it was followed by efforts to limit the discretionary power of the employer to dismiss a worker for any reason or action.¹⁸ At that stage one could only speak of an asymmetry of rights skewed in favour of the worker. This is true especially when you speak in relation to the private sector. It therefore now remains to be seen whether the same can be said in relation to the public sector.

CATEGORIES OF EMPLOYMENT CONTRACTS IN THE PUBLIC SERVICE

Generally, there are three types of employment contracts, whether in the public or private sector. The first one is a contract for a specified piece of work, without reference to time. This is mainly common in the private sector especially in the construction industry where employees are hired for a particular project.¹⁹ Although such contracts are very rare in the public service, their existence cannot be ruled out altogether. At common law such a contract automatically terminates at the completion of the relevant piece of work.²⁰ The second type is a contract for a specified period of time. In respect of these two, the contracts are temporary in nature since they are either for a specified piece of work or for a specified period of time and accordingly do not entitle the employee with any security beyond the specified piece of work or the specified period of time.²¹ The termination here is by operation of law. The most common contract of employment found in both the public and private sector is a contract for an unspecified period of time. This type of contract continues for an indefinite period without reference to a specified piece of work or specified expiry date.²² It is this type of contract that we shall examine in relation to employment security.

THE EMPLOYMENT RELATIONSHIP: STATUS OR CONTRACT?

Generally, the process of employment is usually initiated by way of advertisements in the newspapers. Appointment into the clerical and lower grades in the public service invariably takes the form of the job seeker applying.²³ The conditions required for the formation of a valid contract of public service are basically the same as are required of any other contract of employment.²⁴ When the bargaining process by the parties in relation to salary is over, the appointing authority in the public service will make an offer which may in turn be accepted by the prospective employee. The prospective employee can generally not negotiate the terms and conditions of service applicable to him because they are either in

16 *Ibid.*, note 11.

17 *Ibid.*, note 11.

18 *Ibid.*, note 11.

19 *Duration of the Contract of Employment* Labour Law in Botswana, Andrew Briscoe pg 24. 1995. Section 17 Employment Act Cap 47:01.

20 *Ibid.*, note 17.

21 Kwame Frimpong, *The Protection of Security of Employment in Botswana*.

22 Andrew Briscoe, *Duration of the Contract of Employment, Labour Law in Botswana*, pg 24, 1995. See further, *Ibid.*, note 19.

23 Akintunde Emiola, *Formation of a Contract, The Public Servant and the Law*, 1985.

24 *Ibid.*, note 21.

statute form,²⁵ regulation form²⁶ or general orders made thereunder.²⁷ Once the contract of employment is concluded its execution is then governed by either the Constitution,²⁸ the Public Service Act and Regulations and General Orders. These statutes indeed underscore the special and peculiar nature of the State as an employer when contrasted with the private sector employers. The employment relationship in the public service in Botswana is generally one of contract.

PROBATION

The period when there is little or when security of employment is at its very minimum is the probation period in the public services.

Where any person is appointed to any public office (otherwise than on promotion or transfer) on pensionable terms he shall first serve a probationary period of two years, or such other period as may be prescribed by the Minister for particular public offices.²⁹

The purpose of a probation period is normally to enable the parties to make an assessment of the advantages resulting from the conclusion of an employment contract.³⁰ For the worker, this is a trial period. The worker has to demonstrate his professional abilities. As indicated earlier on, this is a period of insecurity which should not be unduly prolonged. Indeed according to International Labour Organisation Convention No. 158³¹ which was intended to provide protection against unjustified dismissal, "workers serving a period of probation or a qualifying period of employment determined in advance and of reasonable duration are excluded from such protection."³² In terms of the Public Service Act,³³ if the appointing authority is of the opinion that the probationary period should be terminated, the public officer will be advised accordingly in writing and that he has fourteen days within which to make representations. Subject to giving notice as already indicated, the relevant appointing authority may terminate a probationary appointment at any time without assigning reasons therefore. The termination or non-confirmation of a probationary appointment shall not be dismissal or removal from office and the decision of the appointing authority to terminate, extend or not confirm a probationary appointment shall be final and no appeal shall lie therefrom to any other person or body.³⁴

The main thrust of this paper is that once a person is confirmed as a permanent and pensionable officer in the public service after the usual period of probation he holds that appointment until the age of retirement subject, of course, to satisfactory performance and good conduct.³⁵ To be considered against this general proposition is another proposition that the civil servant is a little more than a "tenant at will" of the crown, liable to dismissal

25 Public Service Act, Cap 26:01: Laws of Botswana.

26 *Ibid.*, note 23 Public Service Regulations.

27 General Orders 1987, General Orders Governing the Conditions of Service of the Public Service.

28 Constitution of the Republic of Botswana, Cap 01:01.

29 Section 11 (1) Public Service Act Cap 26:01.

30 *Scope of the Instruments as regards individuals*, Chapter 11: Protection against Unjustified Conference 82nd Session 1995.

31 Termination of Employment Convention, 1982 (No. 158).

32 *Ibid.*, note 29.

33 Section 11 (4).

34 Section 5, Public Service Act Cap 26:02.

35 Section 7, Public Service Act, *Ibid.*

"at pleasure" with no possibility of legal redress.³⁶ This it is submitted has been severely limited in its application and can no longer reflect legal and political reality in the context of the public service in Botswana.

CONSTITUTIONAL PROTECTION

There are various grades of personnel employed in the public service and various appointing authorities in the public service. The protection of these various grades differ according to the appointing authority. The fact that one occupies a high post in government may not necessarily mean that he has more protection. That you are an industrial class worker in government may not necessarily mean that you have less protection. But obviously there are some positions in government whose tenure has been accorded constitutional protection. These are offices of the Attorney General, Auditor General, Judges and Magistrates. For present purposes I shall briefly touch on the office of the Attorney General and Auditor General.

(I) Attorney General

Generally speaking, a person may hold this office until such time that he attains the age of sixty or such age as parliament may in its wisdom prescribe.³⁷ Such a person may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.³⁸ Apart from age, inability to perform the functions of his office and misbehaviour, the Attorney General cannot be removed from office. Quite apart from the substantive protection accorded to him, there is also procedural protection. When the president considers that the question of removing a person holding such office ought to be investigated he shall appoint a tribunal which shall consist of a Chairman and not less than two other members who hold or have held high judicial office.³⁹ The tribunal shall then report and advise the president whether the Attorney General should or should not be removed on the aforementioned grounds.

(II) Auditor General

Similarly such a person may hold such office until the age of sixty.⁴⁰ He may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.⁴¹ If the National Assembly resolves the question whether the Auditor General ought to be investigated and removed from office, then it will by resolution appoint a tribunal consisting of a Chairman and not less than two members who hold or have held high judicial office.⁴² The tribunal shall then enquire into the matter and report to the Assembly. The Assembly may then consider the report and by resolution remove him from office.

36 *Duration of Employment*, Chapter 3, *The Public Servant and the Law* pg 27 1985. *Lister v Romford Ice & Cold Storage Co. Ltd* 1957 AC 555; 1957 (1) ALL ER 125.

37 Leo Blair, *The Civil Servant — Political reality and legal myth* 1958 Public Law, pg 32.

38 Section 113 (1) Constitution Cap 01:01.

39 Section 113 (2) Constitution Cap 01:01.

40 Section 113 (3) *Ibid.*, note 37.

41 Section 114 Constitution Cap 01:01.

42 Note 39 *Ibid.*, subsection (2).

These two positions in the public service together with the positions of Judge and Magistrate enjoy considerable constitutional protection.

STATUTORY PROTECTION

Some public servants may not necessarily have their positions entrenched constitutionally but they also have statutory protection. In the main these are public servants appointed by the Director of Public Service Management as opposed to the president. Here there are no substantive provisions guaranteeing security of employment. Instead the modalities and mechanisms of removing such a public officer have been set up in the regulations.

(I) Efficiency

The main thrust of the paper as indicated earlier on is that once a person is confirmed as a permanent and pensionable officer in the public service after the usual period of probation, he holds that appointment until the age of retirement subject to satisfactory performance and good conduct. This is true in respect of the constitutionally guaranteed positions as well as in respect of public servants appointed by the Director of Public Service Management.

Elaborate mechanisms have been devised which are to be followed if a public officer is to be removed for inefficiency or lack of satisfactory performance. According to the relevant regulations, if a Permanent Secretary is satisfied that an officer is unable to carry out his duties efficiently, he shall submit a report thereon to the responsible officer.⁴³ If satisfied that there are reasonable grounds to substantiate the allegation, the officer affected shall be furnished with a written statement of the grounds on which he is said to be incapable of carrying out his duties efficiently.⁴⁴ The responsible officer may either refer the matter to a Committee of Enquiry or deal with the matter himself. Whichever course of action is taken, the allegation of inefficiency is considered. In the case of the Committee, three officers of senior rank to the officer shall comprise members thereof.

The hearing relating to the inefficiency is in accordance with the principles of natural justice. In other words, the public officer is furnished with the allegations against him in good time and he is given an opportunity to controvert them. The Committee members or the responsible officer should not be biased in dealing with the matter. If the allegation of inefficiency is proved then the public officer in question may lose his job. There is a right of appeal to the Public Service Commission and the President in accordance with the Constitution.⁴⁵

(II) Conduct

Where a Permanent Secretary becomes aware of allegations of misconduct against an officer he is required if he is of the opinion that disciplinary proceedings may be necessary, to instruct some other officer of more or equal rank to hold a preliminary investigation into those allegations.⁴⁶

43 *Ibid* Note 39 subsection (3).

44 Public Service Regulations Cap 26:01 Section 8 (1).

45 Public Service Regulations *Ibid.*, section 8 (2).

46 Public Service Regulations Section 11.

If, following the preliminary investigations, the Permanent Secretary is of the opinion that there is a *prima facie* case against the officer affected he shall prepare a list of charges against the officer which will be sent to the officer in question to reply to the charges. These documents will eventually reach the responsible officer who will then either deal with them or refer them to a Committee of Enquiry which he shall appoint. Upon the conclusion of any enquiry the officer whose conduct is in question will be informed of the outcome. Again the principles of natural justice would have been followed. Again here there is an elaborate system of appeal to the Public Service Commission and eventually to the President.

In the case of officers who can be hired and removed by the Director of Public Service Management, the system of removal from office on account of inefficiency or conduct appears to work very well coupled with the elaborate system of appeals to the Public Service Commission and the President. There is indeed a great deal of protection accorded to those officers.

COMMON LAW PROTECTION?

There are some senior public officers who can only be appointed, disciplined and removed from office by the president.⁴⁷ This is specifically reflected in the Constitution by section 112. Amongst these are Ambassadors, High Commissioners, Principal representatives of Botswana to any country or accredited to any International organisation, Secretary to the Cabinet, Attorney General, Permanent Secretary, Commissioner of Police and any superscale office which may be prescribed by Act of Parliament. As for the Attorney General it has already been mentioned that he has constitutional protection. Regrettably, however, it appears that there is no statutory procedure for disciplining an officer appointed in terms of Section 112. They cannot appeal to the Public Service Commission and the President because they are not appointed in terms of section 110. It is perhaps regrettable that senior as they are in government they should have so little protection within the public service structure. What little protection they have is recourse to the courts which all the other categories of public servants have and to base their arguments on non-compliance with the principles of natural justice. If, however, those principles were complied with then that is the end of the matter.

CONCLUSION

Security of employment cannot be guaranteed in absolute terms. Whilst the fundamental law of the land, the constitution, accords some protection to some key officers in the public service, it omits amongst its fundamental rights and freedoms the right to work. Consequently, whatever protection there is, is found in fragmented and rudimentary statutory form. Admittedly, an attempt was made to create bodies like the Public Service Commission and Judicial Service Commission, to enhance security of tenure in the public service. An appellate structure was created within the service for similar reasons, but that was as far as the state could go. Complementary and powerful mechanisms which included collective bargaining and labour's ultimate weapon, strike action for public servants, was conveniently left out of the statute books.

⁴⁷ Section 111 of the Constitution.



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